IN THE

COURT OF APPEALS OF MARYLAND

September Term, 2002
No. 74

HOLIDAY UNIVERSAL, INC., et al.,

Appellants

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Vincent E. Ferretti, Jr., Judge)

BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Cases (cont'd.) Page

Statutes

Treatises

STATEMENT OF THE CASE

Holiday Universal, Inc., et al., (Holiday) initiated this case by filing a Complaint for Declaratory Judgment and Injunctive Relief challenging a provision of Montgomery County's consumer protection law. The County had enacted a law that imposed a variety of restrictions on future service providers. Holiday cited numerous reasons for alleging that the law was invalid, and a series of motions for summary judgment and cross-motions ensued. (E. 198-204, 210-235)

On appeal, Holiday has abandoned all but three of its arguments whether Montg. Co. Code § 11-4A (1994, as amended) is a local law, whether State law preempts the county law, and whether the circuit court properly severed Montg. Co. Code § 11-4A(c)(5) from the law. These issues derive from Judge Ferretti's order that declared Montg. Co. Code § 11-4A to be valid in general, and found § 11-4A(c)(5) to be invalid, thus striking it from the law. (E. 236-241) After Judge Mason decided the implementation issue and entered the final judgment in the case, Holiday noted an appeal and the County filed a cross-appeal. (E. 263-280) This Court issued a writ of certiorari before the Court of Special Appeals heard the case.

QUESTIONS PRESENTED

I. Is Montg. Co. Code §11-4A a local law?

II. Does State law preempt Montg. Co. Code § 11-4A?

III. Before exercising the option of severing Montg. Co. Code § 11-4A(c)(5) from the law, should the circuit court have interpreted the section in a way that maintained its validity?

STATUTES, ORDINANCES, AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances, and constitutional provisions appears in the appendix to the Appellants' brief or in the appendix to this brief.

STATEMENT OF ADDITIONAL FACTS

Holiday provides a useful timeline of the enactment of Montg. Co. Code § 11-4A, along with the provisions of the law, but a few additional background facts bear mentioning. Over a two-year period during the 1990's, the Office of Consumer Affairs (OCA) had received more than 200 consumer complaints regarding the practices of certain future service businesses in the County. (E. 67) Based on the complaints, it became apparent that various service providers used sophisticated, high-pressure sales techniques that induced a consumer to sign a contract that included a commitment to pay thousands of dollars in advance for services that would be rendered in the future. If the consumer later sought to terminate the contract, some providers asserted that the full contract amount became due and engaged in aggressive collection and contract enforcement practices to collect the full payment. (E. 64) To address this problem, the County Executive

proposed an amendment to the Montgomery County consumer protection law. (Apx. 4-5) The affected service providers included health spas, self-defense schools, dance studios, dating services, and travel or vacation clubs. (E. 72)

ARGUMENT

The County enacted the future service law within its authority as a charter county to provide for the general welfare of its citizens. The law was carefully crafted to remain within the limits of a local law and to avoid conflict with State consumer protection laws. State law does not preempt the consumer legislation enacted by the County and, in fact, expressly encourages this type of local regulation. Moreover, the circuit court should have construed Montg. Co. Code § 11-4A(c)(5) in a way that maintained its validity. Only if no interpretation could salvage the subsection did severing it become appropriate. In no event did a finding of invalidity of § 11-4A(c)(5) render the entire law invalid.

I. Montg. Co. Code § 11-4A is a valid local law.

The County enacted Montg. Co. Code § 11-4A in a proper exercise of its authority as a charter home rule county. The law regulates activities that occur within the County and does not improperly intrude on a significant matter of statewide interest. The circuit court, therefore, properly concluded that Montg. Co. Code § 11-4A was a local law.

As a charter home rule county, the County has broad authority to enact laws that promote the general welfare of its citizens.

Upon electing a charter form of government, a county obtains a certain measure of independence from the State legislature by being authorized to exercise, within well-defined limits, legislative powers formerly reserved to the General Assembly. Md. Const. art. XI-A. The "Home Rule Amendment" was ratified by the voters of this State in November 1915, and evidenced an intent to secure to Maryland citizens "the fullest measure of local self-government" regarding local affairs. *State v. Stewart*, 152 Md. 419, 422, 137 A. 39, 41 (1927). In addition, the Home Rule Amendment mandates that the General Assembly expressly enumerate and delegate those powers exercisable by counties that elect a charter form of government. Md. Const. art. XI-A § 2. The legislature followed this directive by enacting the Express Powers Act, which endowed charter counties with a wide array of legislative powers over local affairs. Md. Ann. Code art. 25A (1998). In 1948, Montgomery County became the first county in Maryland to adopt a charter form of government. *McCarthy v. Board of Education*, 280 Md. 634, 638, 374 A.2d 1135, 1137 (1977).

Among the enumerated express powers is the general authority "to pass all ordinances, resolutions or bylaws. . . as may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Md. Ann. Code

art. 25A, § 5(S). This "general welfare clause" is viewed as the broadest authority for local legislation, because it grants charter counties the power to legislate on matters not specifically enumerated elsewhere. *See Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). In doing so, the clause fulfills the purpose of home rule by enabling the General Assembly to share its legislative power concurrently with charter counties. *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 418, 312 A.2d 225, 234 (1973).[1]

On many occasions, the County has exercised its power under art. 25A, § 5(S) to provide protections that promote the general welfare. For example, in *Greenhalgh*, this Court recognized that the expansive powers granted by art. 25A, § 5(S) authorized the County to enact a fair housing law prohibiting racial and religious discrimination in the sale or rental of housing in the County. 253 Md. at 162, 252 A.2d at 247. The same authority enabled the County to enact comprehensive legislation governing landlord-tenant relationships in the County, which has included regulations affecting the content of leases. *Investors Funding Corp.*, 270

[1]This Court has long recognized the concurrent authority of the State and counties to legislate for the general welfare. *See City of Baltimore v. Sitnick*, 254 Md. 303, 255 A.2d 376 (1969). *See also* discussion in Argument II, *infra*.

Md. at 416, 312 A.2d at 232-233. The general welfare clause also permitted local legislation regarding employment discrimination. *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 770 A.2d 111 (2001). And most recently, this Court upheld the validity of the County's law establishing employee benefits under the authority of art. 25A, § 5(S).[2] *Tyma v. Montgomery County*, 369 Md. 497, 801 A.2d 148 (2002).

Although Montgomery County, like other charter counties, is authorized by art. 25A, § 5(S) to enact consumer protection legislation, the General Assembly has granted all counties the authority to enact consumer protection laws that are more stringent than the State's Consumer Protection Act. Md. Code Ann., Com. Law § 13-103(b).[3] This specific grant of authority is necessary, because commissioner counties do not possess the power to legislate for the general welfare granted to charter home rule counties.

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[2]Guided by the standards set out by this Court, the Court of Special Appeals also has acknowledged the broad enabling authority of art. 25A, § 5(S) when upholding the County's public accommodation law (*Holiday Universal Club of Rockville, Inc. v. Montgomery County*, 67 Md. App. 568, 573-75, 508 A.2d 991, 994-95, *cert. denied*, 307 Md. 260, 513 A.2d 314 (1986)), and the County's towing regulations (*Cade v. Montgomery County*, 83 Md. App. 419, 422-23, 575 A.2d 744, 745, *cert. denied*, 320 Md. 350, 578 A.2d 190 (1990)).

[3]This section can be read as an expression of the General Assembly's intent not to preempt the field of consumer protection. *See* Argument II, *infra*.

Holiday acknowledges that the general welfare clause grants the County broad authority. To escape that authority, Holiday argues that, when a law results in any effect outside the County or has any connection to a State interest, the law is not a local law and is invalid. This approach oversimplifies the standard articulated by this Court. Indeed, using Holiday's analysis, few (if any) local laws would be valid, because close inspection of any local law can reveal an extraterritorial connection or a matter of some State concern. Yet, even though an employer may work and live in a different county (or state) from the location at which the employer employs its workers, a county law prohibiting employment discrimination at work sites located in the county is still valid. Similarly, a landlord and a prospective tenant may live in a different county (or state) from the location of the rental property; this does not mean that a county law cannot prohibit a confessed judgment clause in a lease that covers rental property in the county.

The future service law regulates a matter within the dual authority of the State and the County.

Using the criteria articulated by the courts, Montg. Co. Code § 11-4A meets the requirements of a local law. As a general proposition, a local law applies to only one geographic subdivision (county) in the state, while a public

general law applies to two or more subdivisions. *Tyma*, 369 Md. at 507, 801 A.2d at 154 (citations omitted). The Home Rule Amendment otherwise "attempts no definition of the distinction between a local law and a general law, but leaves that question to be determined by the application of settled legal principles to the facts of particular cases in which the distinction may be involved." *McCrory Corp. v. Fowler*, 319 Md. 12, 17, 570 A.2d 834, 836 (1990) (quoting *Dasch v. Jackson*, 170 Md. 251, 260, 183 A. 534, 537-538 (1936)). But a law is not a local law "merely because its operation is confined to Baltimore City or to a single county, if it affects the interests of the people of the whole state." *McCrory*, 319 Md. at 18, 570 A.2d at 837 (quoting *Gaither v. Jackson*, 147 Md. 655, 667, 128 A. 769, 773 (1925)).

In applying these principles, this Court has invalidated county enactments as non-local laws only when they clearly intruded on some well-defined and significant state interest. For example, in *McCrory Corp. v. Fowler*, the Court struck down that portion of a Montgomery County law creating a private cause of action in the state courts for unlimited monetary damages for violations of the County's employment discrimination law, because it was not a "local law" under the Home Rule Amendment. "In Maryland, the creation of new causes of action in the courts has traditionally been done either by

the General Assembly or by this Court under its authority to modify the common law of this State." *McCrory*, 319 Md. at 20, 570 A.2d at 838. Similarly, in *Gaither v. Jackson*, the Court declared a city ordinance to be outside the scope of a local law when the ordinance had the effect of depriving the State of revenues from auctioneer license fees that the State was otherwise entitled to collect. 147 Md. at 664-665, 128 A. at 772-773; *see also Dasch v. Jackson*, 170 Md. at 260, 183 A. at 537-538 (local regulation of paperhangers interfered with the State's revenue stream). Even longer ago, the Court struck down Somerset County's prohibition of oyster dredging, concluding that it was not a "local law" because the dredging prohibition would deprive people of the entire state of their common right to take oysters within the waters of that county. *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891).

In these cases, the local law trespassed into an area of significant statewide concern that traditionally had been regulated exclusively by the State either through the General Assembly or by this Court. As other cases suggest, however, local laws properly may affect a matter of State interest employment, discrimination, housing. In each of these areas, the field is a valid area for dual regulation by the State and the County. *See Tyma, supra*; *McCrory, supra*; *Investors Funding, supra*.

The General Assembly has dealt a fatal blow to Holiday's local law argument by expressly inviting local consumer protection legislation and enforcement:

> **§ 13-102. Legislative findings; statement of purpose.**
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> * * *
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> (b)(1) It is the intention of this legislation to set certain minimum statewide standards for the protection of consumers across the State, and the General Assembly strongly urges that local subdivisions which have created consumer protection agencies at the local level encourage the function of these agencies at least to the minimum level set forth in the standards of this title.
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> * * *
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> **§ 13-103. Intent; stronger provisions; enforcement.**
>
> (a) This title is intended to provide minimum standards for the protection of consumers in the State.
>
> (b) A county, Baltimore City, municipality, or agency of either may adopt, within the scope of its authority, more stringent provisions not inconsistent with the provisions of this title.
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> * * *

Md. Code Ann., Com. Law §§13-102(b)(1) and 13-103(a) & (b) (1995).[4] Although the State also has an interest in consumer

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[4]State regulation of health clubs has been incorporated into Title 13 by Com. Law §14-12B-08 and, therefore, must be read as part of a single statutory scheme. The legislative history further supports this view. The State's consumer protection law was divided into Titles 13 and 14 as a matter of legislative convenience during the recodification process in 1975. As a result, consumer protection legislation placed in Title 13 would be enforced automatically by the Division of Consumer Protection. The Governor's Commission to Revise the Annotated Code explained the relationship between Title 13 and Title 14 as follows:

> If. . .the General Assembly chooses to enact a new prohibited activity not subject to the jurisdiction

protection, consumer protection legislation remains a valid concurrent power.

Section 11-4A does not regulate conduct outside of the County.

The future service law is a local law, because it applies only to contracts "for the sale of services that . . . will primarily be provided in the County or under a contract signed in the County." Montg. Co. Code § 11-4A(b)(1)(c). The language of this section restricts the application of the law to consumers within the territorial limits of the County, either because they entered into the contractual relationship in the County or because they receive significant services in the County.[5] This reflects a traditional principle that, if an entity (like Holiday) does business in the County, it must comply with local law regulating that business. In fact, § 11-4A affects fewer situations than the County lawfully could

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> of the [Consumer Protection] Division, it need merely add that prohibition to Title 14 of this article, which contains "consumer protection" provisions that are generally independent of the Consumer Protection Act and the authority of the Division.

Commission Report No. 1975-1, p. 27.

[5]This Court adheres to a policy that favors construction of a statute in a way that avoids finding the statute unconstitutional. *Tidewater/Havre de Grace v. Mayor and City Council of Havre de Grace*, 337 Md. 338, 352, 653 A.2d 468, 475 (1995).

regulate the County could have said that each consumer who enters a facility in the County and receives services in that facility even once is entitled to certain legal protections, including a contract that contains certain disclosures. Instead, presumably out of deference to businesses with a national presence, the County chose not to include within the future service law those customers who may visit the area briefly or who choose to utilize the services of a facility located in the County on an infrequent basis.

As a practical matter, if Holiday wants to enter into contracts outside of the County to provide services outside of the County, it may do so without complying with Montg. Co. Code § 11-4A. But once it chooses to operate health club facilities in the County and enters into contracts permitting its customers to use those facilities, it must conform to County law or do business elsewhere. This is no different than requiring a landlord who leases a house in the County to conform the rental contract to the requirements of the County's landlord-tenant law, even though the landlord may live in Howard County and the landlord and tenant sign the lease in Ellicott City.

To address consumer rights effectively in the County either the contract terms or its performance the language of the statute had to include both possibilities.

The County law regulates only activities occurring within the County and reflects a valid exercise of the general welfare clause. The circuit court, therefore, properly upheld the validity of Montg. Co. Code § 11-4A.

An indirect effect outside the county does not invalidate the future service law.

So long as the enactment regulates only conduct within the jurisdiction, it is not being given extraterritorial effect. And an ordinance limited to the territory of the subdivision does not become invalid merely because it may have an indirect effect on the conduct of persons outside the subdivision:

> [A]s a general rule, one State cannot regulate activity occurring in another State, and that, in deference to that principle, regulatory statutes are generally construed as not having extra-territorial effect unless a contrary legislative intent is expressly stated. That does not mean, however, that a State cannot, through the proper regulation of activity occurring within its borders, also affect conduct occurring elsewhere. The focus must be on the nature of the conduct affected by the regulation, the nexus that such conduct has with activity occurring within the State that is the proper subject of regulation, and the nature and scope of the regulation.

Consumer Protection Division v. Outdoor World Corp., 91 Md. App. 275, 287, 603 A.2d 1371, 1382 (1992) (citations omitted).

Other states share this long-settled view that an ordinance may have an indirect effect on the conduct of persons outside the subdivision, when the law is otherwise

limited to the territory of the subdivision enacting the ordinance. A prime example appears in the prohibition of the sale of goods within a municipality unless certain precautions have been taken in the production and manufacture of those goods. Even though all of the goods are produced or manufactured outside the municipality, the restrictions have been upheld as valid. *See State v. Nelson*, 68 N.W. 1066 (Minn. 1896); *Korth v. Portland*, 261 P. 895 (Ore. 1927); *Norfolk v. Flynn*, 44 S.E. 717 (Va. 1903). *See also*, Annot. 14 A.L.R.2d 103 (1950). Similarly, a consumer regulation does not become invalid solely because it protects consumers outside the county, as well as those within the county. *Brown v. Market Development, Inc.,* 322 N.E.2d 367 (Ohio 1974).

The County recognizes that it cannot directly regulate activity outside of the County. *See Consumer Protection Division v. Outdoor World Corp., supra*. From this standpoint, Holiday's hypothetical situation in which a person who signs a contract in California would need to use the Montgomery County contract form creates an interesting question of how the statute will be applied. But the possibility that a situation could arise that does not fit within the statute does not render the law facially invalid, as Holiday contends. There are many instances in which Montg. Co. Code § 11-4A could be applied because the relevant activities occurred

within the County. *See Consumer Protection Division*, 91 Md. App. at 287, 603 A.2d at 1382. Holiday could remedy the situation easily by amending its contract form to require the consumer to identify the facility the consumer intends primarily to use, or to exclude (as in its California contracts) access to Montgomery County facilities.

II. State law does not preempt Montg. Co. Code § 11-4A, but rather, expressly permits local legislation regarding future service contracts.

Dual state and local government regulatory schemes have long been permissible in Maryland under the "concurrent power theory," which this Court first applied in 1909. *Rossberg v. State*, 111 Md. 394, 415-416, 74 A. 581, 584 (1909). Since then, this theory "has been recognized with some frequency." *Sitnick*, 254 Md. at 312, 255 A.2d at 380. The concurrent power theory "allows local legislation in certain fields where the State Legislature has acted if the local governments otherwise have authority to enact legislation on the subject." *County Council v. Montgomery Ass'n.*, 274 Md. 52, 57, 333 A.2d 596, 599 (1975). The legislative authority of the State and its political subdivisions is not necessarily mutually exclusive. Rather, both the state and its subdivisions may legislate on a particular subject if the local governments have authority to enact legislation on the subject and the matter is both of sufficient *statewide* interest to support a

general law and sufficient *local* interest to support a local law. *American National Building & Loan Ass'n. v. Mayor and City Council of Baltimore*, 245 Md. 23, 31, 224 A.2d 883, 887 (1966).

The test for preemption requires consideration of "whether the General Assembly has manifested a purpose to occupy exclusively a particular field." *Holmes v. Maryland Reclamation Associates, Inc.*, 90 Md. App. 120, 142, 600 A.2d 864, 874 (1992) (citing *Ad+Soil, Inc. v. County Comm'rs.*, 307 Md. 307, 324 A.2d 893, 902 (1986)). Holiday admits that no express preemption exists in this case, but argues that the State has enacted a comprehensive and exclusive scheme concerning matters of vital State interest. Although only regulating certain aspects of health club activity, Holiday contends that the State has impliedly preempted the County's future service law. *See, e.g., Howard County v. Pepco*, 319 Md. 511, 573 A.2d 821 (1990). Contrary to Holiday's contention, the State law clearly invites concurrent local regulation, and Montg. Co. Code § 11-4A does not conflict with State law. *See* Md. Code Ann., Com. Law §§ 13-102 and 13-103.[6] These factors preclude a finding of preemption by implication

[6]Upon review of the proposed legislation, the Assistant Attorney General advising the General Assembly agreed that State law did not preempt County legislation. (Apx. 23)

or by conflict. *See Ad+Soil*, 307 Md. at 333-34, 513 A.2d at 906-07.

The General Assembly has manifested an unequivocal purpose to establish "minimum standards for the protection of consumers" and encourages local supplemental consumer protection legislation to allow "more stringent provisions" to be adopted by the localities. Md. Code Ann., Com. Law §§ 13-102, 13-103, and 13-105. The State law also regulates health clubs in a limited manner, leaving many facets of these businesses unregulated.[7] *See* Md. Code Ann., Com. Law §§14-12B-02 through 14-12B-08, and 13-101, *et seq*. Again, the

[7]The State law governing health club services requires health clubs to register and post a bond in certain cases and creates some consumer rights. Among the rights granted to consumers are: a right to make a claim against the bond in the event that the facility closes or files bankruptcy; a right to cancel a health club contract in the event of a disability or upon closing of a facility; a right to cancel a health club contract if the health facility fails to open by a specified date; a prohibition against an automatic renewal clause; and a right to cancel a health club contract within 3 business days of receiving the contract. Md. Code Ann., Com. Law §§ 14-12B-02 through 14-12B-07.

On the other hand, the provisions in the County's consumer protection law either regulate different aspects of these businesses or impose more stringent standards on them by specifically requiring merchants to: (a) offer short-term contract options to consumers; (b) refrain from demanding more from defaulting consumers than merchants are lawfully entitled to retain; (c) refund amounts paid by consumers within 15 days under certain circumstances in which cancellation is permitted by statute or contract; (d) refrain from representing that consumers have no legal right to terminate contracts; and (e) notify consumers of the right to cancel electronic charges to a credit card under federal law. Montg. Co. Code § 11-4A.

State law expressly permits and encourages local legislation regarding consumer protection. *Id.* at § 13-103. The General Assembly has left no doubt that it intends and expects local governments to enact legislation in the field of consumer protection, including the regulation of health clubs. Holiday attempts to dismiss this invitation for local regulation by pointing out that it appears in only Title 13, and not Title 14. But the two are joined one contains the Consumer Protection Act (Title 13), while the other sets out Miscellaneous Consumer Protection (Title 14). And the State's health club law specifically declares any violation of its terms to be "an unfair or deceptive trade practice under Title 13 of this article." Md. Code Ann., Com. Law § 14-12B-08(b).

The consumer protection law, therefore, clearly reflects a different legislative intent than those laws that have been held to preempt local legislation. For example, in *County Council v. Montgomery Ass'n.,* this Court evaluated the State election financing practices and explained that "the constitutional and statutory provisions. . .demonstrate that the General Assembly is obligated to enact and has enacted a comprehensive plan for the conduct of elections in Maryland," and "[i]t is difficult to imagine an area the General Assembly has more 'forcibly express[ed] an intent to occupy a specific field of regulation' than in [the] area [of conduct of

elections]." 274 Md. at 64, 333 A.2d at 603. Only in this narrow context did the Court find it significant that a provision in the County ordinance had a "counterpart" in the State Election Code. *Id.* at 63, 333 A.2d at 602.

Unlike the authority to regulate elections, the constitution has not delegated to the General Assembly the exclusive responsibility to regulate consumer protection in general, nor health clubs in particular. Instead, preemption applies only when the State has a vital interest in being the sole actor in a particular legislative field. Just because the State deals with a subject area does not mean that it intends to preclude a county from addressing that same subject area many areas of legislation involve concurrent authority of the State and the counties.[8] The laws regulating consumer protection and health clubs reflect this dual authority between the State and the County.

Similarly, in *Allied Vending, Inc. v. Bowie*, this Court found the sale of cigarettes through vending machines to be one of those "area[s] in which the Legislature has acted with

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[8]*See* discussion of fair housing and employment discrimination, Argument I, *supra*. The Court of Special Appeals used a similar analysis when it permitted a local government to impose reporting requirements on pawn brokers despite a provision of State law expressly limiting local authority to regulate dealers in "second-hand precious metals." *Hamdan v. Klimovitz*, 124 Md. App. 314, 722 A.2d 86 (1998).

such force that an intent by the State to occupy the entire field must be implied. . . ." 332 Md. 279, 300, 631 A.2d 77, 87 (1993) (quoting *Montgomery Ass'n.*, 274 Md. at 59, 333 A.2d at 600). This holding derived from numerous factors that do not exist in this case, including: a lengthy statutory scheme broadly covering the field of cigarette sales and its various aspects; a long history (since 1890) of exclusive control over the sale of cigarettes by the General Assembly; regulation in an area where no local control traditionally has been exercised; the lack of any reference in the State statute to concurrent legislative authority of local jurisdictions; and a feeling that allowing regulation in each jurisdiction would invite chaos and confusion tantamount to a ban on cigarette vending machines in locations at which the State has granted the vendors licenses to operate those vending machines. *Id.* at 300-303, 631 A.2d at 87-89.

These cases reflect that this Court has consistently found preemption only when strong evidence of a countervailing legislative purpose to prohibit local control exists.[9] On the

[9]Other cases where preemption applied involved situations that mandated Statewide uniformity: *McCarthy v. Board of Education of Anne Arundel County*, *supra* (State education law preempts local legislation because State law is all-encompassing, providing a comprehensive system of education, and the State Constitution assigns to the General Assembly the responsibility to establish a thorough public school system); *Montgomery County Board of Realtors, Inc. v. Montgomery County*, 287 Md. 101, 411 A.2d 97 (1980) (State law regarding

other hand, the Court gives great deference to the local authority to regulate specific issues not expressly addressed in the State legislation. *Board of Child Care v. Harker*, 316 Md. 683, 698, 561 A.2d 219, 226 (1989) (State licensed and regulated child care facility is subject to local zoning ordinance).

While Holiday tries to create a conflict out of the County's more stringent consumer protection law, its argument must fail. The General Assembly has made plain its intent that local legislation may impose additional requirements not contained in the State law. Md. Code Ann., Com. Law §§ 14-12B-08 and 13-103. Holiday's only real complaint is that the County law requires different disclosures, contract options, and collection methods than the State law. But these details reflect the County's exercise of the State-authorized ability to enact more stringent provisions. Holiday also tries to create a conflict out of the three-day cooling off provision, but misstates the County law to do so. (*See* appellant's

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assessment and taxation of real property preempts local law because State law establishes an elaborately detailed scheme of property assessment and taxation); *Howard County v. Pepco*, *supra* (State law authorizing Public Service Commission (PSC) to approve electric transmission lines carrying more than 69,000 volts preempts local zoning ordinance, because State law intended to give PSC final authority over transmission lines in excess of 69,000 volts and permitting local legislation to regulate these transmission lines could lead to chaos).

brief, p. 23 n. 14.) County law plainly uses "business days," and defers to "any longer period allowed by State or Federal law." Montg. Co. Code § 11-4A(c)(1)(B). Neither implied preemption nor preemption by conflict apply to invalidate Montg. Co. Code § 11-4A, and the circuit court correctly upheld the law.

III. Before severing Montg. Co. Code § 11-4A(c)(5) from the law, the circuit court should have interpreted the subsection in a way that maintained its validity.

The circuit court made one error with respect to Montg. Co. Code § 11-4A(c)(5) before declaring § 11-4A(c)(5) to be unconstitutionally vague, the court had a responsibility to interpret the section in a manner that would render it valid. Only if it could not do so should the court have severed the provision from the law. And in no event did the entire future service law become invalid, even if § 11-4A(c)(5) is invalid.

Generally, if there are any considerations relating to public welfare by which a local legislative act may be upheld, a court must do so. *Office of People's Counsel v. Public Service Commission*, 355 Md. 1, 26, 733 A.2d 996, 1009 (1999). Not only must a court make every effort to find a construction that renders the law valid, but this Court has "consistently followed 'the principle that a court will, whenever reasonably possible, construe and apply a statute to avoid casting

serious doubt upon its constitutionality.'" *Becker v. State*, 363 Md. 77, 92, 767 A.2d 816, 824 (2001) (citations omitted). Moreover, "[i]f a statute is susceptible of two reasonable interpretations, one of which would involve a decision as to its constitutionality, the preferred construction is that which avoids the determination of constitutionality." *Id.* (citation omitted). Because "the legislative body has the duty of enacting laws, the judicial part of the government should interfere as little as possible with that duty, and should not strike down any law passed by the legislature (or Ordinance passed by a [County] Council) which can be reasonably upheld." *Brooklyn Apartments v. Mayor and City Council of Baltimore*, 189 Md. 201, 207, 55 A.2d 500, 503 (1947).

At a minimum, Holiday had to negate every reasonable, conceivable basis that might support the challenged statute. *See* 16A Am.Jur.2d, *Constitutional Law*, § 251. Yet, the record presented to the County Council showed that, for many years, Holiday and other future service providers required consumers to enter into long-term contracts and then threatened collection and legal action against consumers for the entire amount of the contract, even though the consumer would not receive services for the balance of the contract term. (E. 67-69; Apx. 4-22) Upon cancellation or breach by the

consumer, these businesses sought amounts from consumers exceeding that to which they were lawfully entitled, i.e., once services ceased, some future service providers sought the entire balance of the contract amount. (Apx. 8, 12, 16, 21-22) After careful consideration, and in the proper exercise of its authority, the County Council determined that the history of unfair and heavy-handed business practices by future service providers required the enactment of Montg. Co. Code § 11-4A to regulate these legal relationships more fairly. (E. 71-77)

From this context, the circuit court plainly could have interpreted Montg. Co. Code § 11-4A(c)(5) as a simple prohibition against pursuing collection efforts for payments to which the service provider is not lawfully entitled. This construction would have permitted the court to hold the provision to be valid while effectuating the legislative intent of the law. For this reason, the County filed this cross-appeal seeking reversal of the circuit court's decision and reinstatement of § 11-4A(c)(5) into the law.

Alternatively, if this Court determines that no interpretation can be given to Montg. Co. Code § 11-4A(c)(5) to render it constitutionally valid and enforceable, then the circuit court correctly severed the provision from the law. Maryland law recognizes "a strong presumption that if a

portion of an enactment is found to be invalid, the intent [of the legislative body] is that such portion be severed." *Montrose*, 363 Md. at 596, 770 A.2d at 129 (citations omitted). One need only look at the entirety of Montg. Co. Code § 11-4A to recognize that severing § 11-4A(c)(5) upon a determination of invalidity leaves in place many meaningful provisions to protect the interests of consumers. These include the disclosure requirements and the right to enter into a short-term contract. *See* Montg. Co. Code § 11-4A(c)(6) and (c)(3), respectively.

Contrary to Holiday's contention that severing the section from the law guts the entire law, the remaining subsections of Montg. Co. Code § 11-4A enumerate important provisions regulating unfair trade practices that should not be obliterated based on a perceived defect in one subsection. Even with one small provision severed, § 11-4A addresses the Council's perceived problem with an industry that couples aggressive sales practices and relentless collection practices with long-term contracts. The Council intended to stem the flow of unfair dealings between consumers and future service providers, and the remainder of Montg. Co. Code §11-4A achieves this goal.

The County respectfully suggests that Montg. Co. Code § 11-4A(c)(5) is not unconstitutionally vague when read in the

context of the law. Even if it does not withstand constitutional scrutiny, the section could be severed from the law and does not require invalidation of the rest of § 11-4A.

CONCLUSION

The County enacted a stringent law to protect consumers in their dealings with future service providers. The future service law reflects a proper exercise of the County's authority under the general welfare clause to enact local laws, and the circuit court properly upheld Montg. Co. Code § 11-4A as a valid local law. The sole error by the circuit court was its invalidation of Montg. Co. Code § 11-4A(c)(5), when the provision could have been read in a manner to preserve its effect and to promote the legislative intent. Alternatively, the circuit court acted appropriately in severing only that provision that it viewed to be unconstitutional, leaving the remainder of the statute in effect.

The County, therefore, requests that this Court affirm the circuit court's rulings that the future service law was within the County's authority under the Express Powers Act and constitutes a valid local law. This Court also should affirm the circuit court's conclusion that State law does not preempt the County's legislation, either impliedly or by conflict. Finally, the County asks this Court to reverse the circuit

court's decision that Montg. Co. Code § 11-4A(c)(5) was unconstitutional, by construing the subsection in a manner that preserves its validity. In the alternative, the County asks this Court to affirm the circuit court's decision to sever the subsection from the law, rather than to nullify the entire statute.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Md. Const. art. XI-A, § 2:

§ 2. Grant of express powers.

The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such express powers granted to the Counties and the powers heretofore granted to the City of Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.

Excerpts from Md. Code Ann., Com. Law:

§ 13-102. Legislative findings; statement of purpose

(a)(1) The General Assembly of Maryland finds that consumer protection is one of the major issues which confront all levels of government, and that there has been mounting concern over the increase of deceptive practices in connection with sales of merchandise, real property, and services and the extension of credit.

(2) The General Assembly recognizes that there are federal and State laws which offer protection in these areas, especially insofar as consumer credit practices are concerned, but it finds that existing laws are inadequate, poorly coordinated and not widely known or adequately enforced.

(3) The General Assembly of Maryland also finds, as a result of public hearings in some of the metropolitan counties during the 1973 interim, that improved enforcement procedures are necessary to help alleviate the growing problem of deceptive consumer practices and urges that favorable consideration be given to requests for increased budget allocation for increases in staff and other measures tending to improve the enforcement capabilities or increase the authority of the Division.

(b)(1) It is the intention of this legislation to set certain minimum statewide standards for the protection of consumers across the State, and the General Assembly strongly urges that local subdivisions which have created consumer protection agencies at the local level encourage the function of these agencies at least to the minimum level set forth in the standards of this title.

(2) The General Assembly is concerned that public confidence in merchants offering goods, services, realty, and credit is being undermined, although the majority of business people operate with integrity and sincere regard for the consumer.

(3) The General Assembly concludes, therefore, that it should take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland. It is the purpose of this title to accomplish these ends and thereby maintain the health and welfare of the citizens of the State.

* * *

§ 13-105. Construction

This title shall be construed and applied liberally to promote its purpose. It is the intent of the General Assembly that in construing the term "unfair or deceptive trade practices", due consideration and weight be given to the interpretations of § 5 (a)(1) of the Federal Trade Commission Act by the Federal Trade Commission and the federal courts. [footnote omitted]

§ 14-12B-05. Failure to open on time

(a) If a health club facility is not in existence on the date the health club services agreement is executed:

(1) The buyer may cancel the contract in the event the facility is not open for business on the date as provided by the agreement; and

(2) The buyer may cancel the contract within 3 business days after the opening of the facility, or after receiving notice of the opening of the facility, whichever comes later, in the event the services or facilities are not available substantially as described in the agreement.

(b) If the buyer cancels under this section, the health club facility shall refund any deposit, down payment, or payment on the agreement including any initiation, deposit, membership, or other fees.

§ 14-12B-06. Automatic renewal; cancellation

(a) A health club services agreement may not contain an automatic renewal clause, unless the agreement provides for a renewal option for continued membership which must be accepted by the buyer.

(b) (1) A buyer described in § 14-12B-01(b)(1)(i) of this subtitle may cancel a health club services agreement within 3 business days after receipt of a copy of the agreement by notifying the health club in writing. Written notification shall be delivered in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, and if mailed shall be postmarked by midnight of the third business day.

(2) If the buyer cancels within 3 business days, the health club facility shall refund any deposit, down payment, or payment on the agreement including any initiation, deposit, membership, or other fees.

(3) Each contract for health club services shall conspicuously disclose under the heading "Notice of Consumer Rights":

(i) The seller's health club registration number with the Division;

(ii) A description of whether the seller is bonded and the amount of the bond or, if not bonded, an explanation of the basis for the seller's exemption from the bonding requirements;

(iii) The buyer's right to cancel as defined in this section;

(iv) The buyer's rights in the event of a disability or temporary closing under § 14-12B-04 of this subtitle; and

(v) For those persons who register in accordance with § 14-12B-02(b)(3)(iii) of this subtitle, a statement that the facility does not:

1. Charge an initiation fee or other fee that is not identified as a payment for specific future services;

2. Contractually obligate a buyer of health club services to pay in advance of the date the services are provided to the buyer; or

3. Collect from a buyer of health club services any payment in advance of the date the services are provided to the buyer.

(4) Each contract for the sale of health club services shall contain in a form acceptable to the Division:

(i) A clear and conspicuous itemized description of any fees and charges; and

(ii) If the facility is not in operation, the expected date of opening and a description of the specific services and facilities that will be available upon opening.

(c) A person who registers in accordance with § 14-12B-02(b)(3)(iii) of this subtitle shall post in a clear

and conspicuous manner a sign in a prominent location in each health club facility that the person opens or operates that states that the facility does not:

(1) Charge an initiation fee or other fee that is not identified as a payment for specific future services;

(2) Contractually obligate a buyer of health club services to pay in advance of the date the services are provided to the buyer; or

(3) Collect from a buyer of health club services any payment in advance of the date the services are provided to the buyer.